FILED: MAY 5, 1995

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TROY ISAIAH MITCHELL, *Petitioner,* vs. K. W. PRUNTY, Chief Deputy Warden, *Respondent.*	)	No. CV 93 5796 RG(GHK) JUDGMENT

Pursuant to the Order of the court adopting findings conclusions, and recommendations of the United States Magistrate Judge,

IT IS HEREBY ADJUDGED that this action is dismissed on the merits.

DATED: This 2 day of May, 1994.

"/Richard A. Gadbois
RICHARD A. GADBOIS, JR.
United States District Judge

FILED: MAY 4, 1994

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TROY ISAIAH MITCHELL, *Petitioner*, vs. K. W. PRUNTY, Chief Deputy Warden, *Respondent*.	) Case No.) CV 93 5796 RG(GHK))) ORDER ADOPTING) FINDINGS,) CONCLUSIONS, AND) RECOMMEN-) DATIONS) OF UNITED STATES) MAGISTRATE) JUDGE

Pursuant to 28 U.S.C. § 636, the court has reviewed the petition, all of the records and files herein, and the attached Report and Recommendation of the United States Magistrate Judge. The court, having conducted a de novo review of the Magistrate Judge's Report and Recommendation to which Objections were interposed, approves and adopts the Magistrate Judge's findings, conclusions, and recommendations.

IT IS HEREBY ORDERED that this action is dismissed on the merits.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, together with the Magistrate Judge's Report and Recommendation, and the Judgment herein, by United States mail, on petitioner and on the Attorney General for the State of California.

DATED: This 2 day of May, 1994.

"/Richard A. Gadbois
RICHARD A. GADBOIS, JR.
United States District Judge

FILED: APRIL 4, 1994

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TROY ISAIAH MITCHELL, *Petitioner,* vs. K. W. PRUNTY, Chief Deputy Warden, *Respondent.*	) Case No.) CV 93 5796 RG(GHK))) REPORT AND) RECOMMENDATION) OF UNITED STATES) MAGISTRATE JUDGE))

This Report and Recommendation is filed pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central district of California.

BACKGROUND

On September 24, 1993, petitioner, a state prisoner, filed this federal habeas petitioner challenging his second degree murder conviction. A return and a traverse have been filed.

PETITIONER'S CONTENTIONS

Petitioner contends that there was insufficient evidence to support the conviction and that the trial court erred in its instruction to the jury.

DISCUSSION

1. Insufficiency of Evidence

Petitioner was charged with the murder of Jerry "Judabean" Knox, with an allegation that he personally used a firearm during the commission of the crime. (C.T. at 81-82). The jury found petitioner guilty second degree murder but found that petitioner did not personally use a firearm, (C.T. at 207), and that he was not the driver of the car which drove over the victim's body after the shooting. (Id).

To determine whether there is sufficient evidence to support petitioner's conviction, the relevant inquiry is:

> "[W]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt."

Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); see also Prantil v. State of California, 845 F.2d 314, 316 (9th Cir.), cert. denied, 488 U.S. 861, 109 S. Ct. 158, 129, L.Ed.2d 129 (1988). However, a reviewing court need not ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Jackson, 443 U.S. at 318-319.

The trial court gave the following instructions in relation to aiding and abetting:

"The persons concerned in the commission of a crime who are regarded by law as principals in the crime thus committed and equally guilty thereof include:

1. Those who directly actively commit the act constituting the crime, or

2. Those who aid and abet the commission of the crime.

(C.T.at 156, citing CALJIC 3.00).

A person aids and abets the commission of a crime when he or she,

(1) with knowledge of the unlawful purpose of the perpetrator and

(2) with the intent or purpose of committing, encouraging, of facilitating the commission of the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime.

A person who aids and abets the commission of a crime need not be personally present at the scene of the crime.

Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.

Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.

(C.T. at 157, citing CALJIC 3.01).

> "One who aids and abets is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and probable consequences of any criminal act that he knowingly and intentionally aided and abetted, even though such act was not intended as a part of the original plan and even though he was not present at the time of the commission of such act. You must determine whether the defendant is guilty of the crime originally contemplated, and, if so, whether the crime charged in Count one was a natural and probable consequence of such originally contemplated crime.

(C.T. at 158, citing CALJIC 3.02).

Also, under California law, the natural and probable consequence doctrine states: "[A] defendant whose liability is predicated on his status as an aider and abettor need

not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator." People v. Croy, 41 Cal.3d. 1, 12, n.5, 221 Cal.Rptr. 592, 710 P.2d 392 (1985).

Viewed in the light most favorable to the prosecution, the evidence showed: Maurice Taylor, Judabean (the victim), Eight-ball, and Big Black were standing at the corner of 43rd and Kansas. (R.T. at 39-40.) They all belonged to the Four Tray Hoover gang. (Id.). Petitioner, who was a member of the Rolling Forties Crips gang, yelled "Fuck Hoovers" in the direction of Judabean from his apartment building. (R.T. at 42-43, 51). Judabean and the others ran up the stairs to petitioner's apartment and a fist fight ensued between the Hoovers and the Rolling Forties. (R.T. at 43-44).

Judabean fought with petitioner. (R.T. at 52). After the fight, Judabean and the others went back to the street corner. (R.T. 45).

Petitioner then came downstairs, got into a car with several other Rolling Forties and drove to where Judabean was. (R.T. at 56-57). Someone yelled out "neighborhood Rolling Forty Crips" and petitioner leaned out and fired four shots, hitting Bib Black in the ankle and Judabean in the arm. (R.T. at 57- 58). Taylor and Eight Ball took Big Black to the hospital. Judabean went to his aunt's house and asked his girlfriend, Kimberly Johnson, to take him to the hospital. (R.T. at 102-03).

As they passed petitioner's apartment on their way to the hospital, Judabean told Kimberly to stop the car. (R.T. at 104). Kimberly saw five or more black males on the balcony of an apartment with a long black gun sticking out over the balcony. (R.T. at 105-106). After exiting the car, Judabean said, "I wish you would shoot me . . . I dare your to shoot me." (R.T. at 106-08).

The men on the balcony fired at Judabean, and he fell to the ground. The men also started shooting at the car, and Kimberly drove away. (R.T. at 108-09).

Another prosecution witness also testified that there were two black men on the balcony, joined later by eight to nine others when Kimberly's car arrived at the apartment and that petitioner was one of the shooters on the balcony. (R.T. at 140-44).

The above evidence supports a finding that petitioner is liable as an aider and abettor for second degree murder.[1] The Rolling Forties had earlier engaged in a fist fight with Judabean and had shot at him and his friends. Thus, it was reasonably foreseeable that they would shoot at them again if an opportunity arose.

The jury could have reasonably concluded on this evidence, viewed in the light most favorable to the

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1. Because the jury found petitioner did not use a firearm, and did not drive the car which ran over the victim's body, petitioner's liability must have been based on the theory of aiding and abetting.

prosecution, that petitioner permitted armed fellow gang members to be on his balcony with the intent of facilitating further shootings of rival gang members. Because it was reasonably foreseeable that the gang members could kill someone while committing an act the natural consequences of which were dangerous to human life, e.g., shoot at a person, petitioner is guilty as an aider and abettor of second degree murder. See People v. Croy, 41 Cal.3d at 12 n.5.

2. Jury Instruction

During deliberation, the jury posed the following question:

" . . . is the defendant aiding and abetting in the commission of a crime (murder) or the natural consequence (murder) if he allows/or facilitates or promotes the introduction of deadly firearms into his home?" (Petition Exh. B at 7). The trial court answered as follows:

I read the question. I'm not going to answer that. I'm going to try to answer another question in the following manner. And I talked to the attorneys and this is what we're going to state:

If you find that the defendant let or allowed firearms into his apartment with the intent and mental state as defines murder of the first or second degree, then the answer to your question is yes, which means that if you found that the defendant allowed or let the firearm or firearms into his apartment with the intent to use them in the crime of murder, first- or second-degree murder, then the answer is yes. But if you found that the defendant let or allowed the firearms into his apartment without such intent or mental state, then the answer is no.

Now, I'm going to re-refer you to some instructions that you were given at the very beginning and you can reread those. Those might help key you into the areas insofar as this question goes. So if someone has a piece of paper and pencil, I am going to give you the numbers of the instructions and title on the particular instructions that you have. I'm almost positive in the upper left-hand corner of the instruction sheet these numbers refer to them.

The first one is 3.00. That defines principals. It defines what a principal is and what a principal isn't. The next is 3.01, which is the aiding-and-abetting definition. Next is 3.02, "principals - liability for natural and probable consequences." The next is 3.31. That's "concurrence of act and specific intent," and 3.31.5, which is "mental state."

> I don't want you to give any undue attention to the titles I gave the instructions. I want it to be neutral. I want you to refer to the right instructions, and hopefully this will assist you as to what the law is in this area, and hopefully this will allow you to reach a just and proper verdict based on the facts and the law. Okay. You can retire . . . . (Augmented R.T. at 13-15).

Petitioner contends that the trial court erred by instructing the jury to convict petitioner if they find that petitioner shared the intent to use the 'firearms in the crime of murder.

Petitioner is not entitled to habeas relief unless an alleged instructional error so infected the entire trial that the resulting conviction violates due process. Cupp v. Nauahten, 414 U.S. 141, 147, 94 S. Ct. 396, 3B L.Ed.2d 368 (1973). "To warrant habeas relief, the instruction cannot be merely undesirable, erroneous, or even 'universally condemned,' 'but must violate some due process right guaranteed by the Fourteenth Amendment.'" Prantil, 843 F.2d at 317, quoting Cupp v. Nauqhten, 414 U.S. at 146.

As discussed above, since an aider and abettor must aid or encourage the commission of a crime with the intent of committing or encouraging the commission of the crime, the trial court did not err in instructing the jurors to convict petitioner if they find that petitioner shared the intent to use the firearm to commit murder. This is especially true in light of the overall instructions the court gave to the jurors. See Prantil, 843 F.2d at 317 (court reviews alleged jury instruction errors "'in the context of the overall charge to the jury as a component of the entire trial process'")(Citation omitted).

CONCLUSION

The Magistrate Judge recommends that the District Judge issue an order (1) denying this petition for writ of habeas corpus, (2) dismissing this action on the merits, and (3) approving and adopting this Report and Recommendation.

Dated: This 4th day of April, 1994

"s/George H. King"
GEORGE H. KING
United States Magistrate Judge